BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA S. BAUER	)	
Claimant	)	
	)	
VS.	)	
	)	
MORAN MANOR	)	
Respondent	)	Docket No. 1,041,383
	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 27, 2010, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Blake Hudson, of Fort Scott, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to give respondent notice of her accident. Accordingly, claimant's request for preliminary benefits was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 23, 2009, Preliminary Hearing and the exhibits, the transcript of the September 15, 2010, Preliminary Hearing, and the transcript of the discovery deposition of Linda S. Bauer taken November 24, 2008,[1] together with the pleadings contained in the administrative file.

[1] The discovery deposition of claimant taken November 24, 2008, was made a part of the record by agreement of the parties at the Preliminary Hearing held December 23, 2009. See pg. 22.

ISSUES

Claimant requests review of the ALJ's finding that she failed to give respondent notice of her work-related injury.

Respondent argues that claimant's testimony is not credible and, therefore, she had not carried her burden of proving that she provided respondent with timely notice of her alleged work-related injury.

The issue for the Board's review is: Did claimant provide respondent with timely notice of her alleged work-related accident?

FINDINGS OF FACT

Claimant worked for respondent for a six-week period as a charge nurse on the evening shift beginning August 16, 2007. She is claiming that she sustained a series of injuries to her right leg, right knee and all other parts of the body affected each and every working day between August 16, 2007, and ending on her last day worked, September 26, 2007.[2]

A preliminary hearing was held in this matter on December 23, 2009, based on claimant's request for medical benefits. Respondent defended its denial of claimant's request by arguing that claimant did not suffer an injury that arose out of and in the course of her employment and, in the alternative, she did not provide respondent with timely notice of her alleged injury. The ALJ, based on a court-ordered independent medical examination (IME) report of Dr. Paul Stein, denied claimant's request for treatment in his preliminary hearing order of February 8, 2010. The ALJ did not specifically make a finding as to whether claimant's injury arose out of and in the course of her employment, and he further concluded that the notice issue was moot.

Claimant appealed the ALJ's February 8, 2010, Order to the Board. On April 30, 2010, Board Member Foreman found: "The ALJ's preliminary hearing Order reveals no such finding or conclusion [that claimant's injury arose out of and in the course of her employment] in its language; however, it is implicit in his Order."[3] After making findings of fact and conclusions of law, Board Member Foreman held: "Based on the record compiled to date, this Board Member concludes claimant suffered personal injury by accident arising out of and in the course of her employment with the respondent."[4] Board Member Foreman remanded the case to the ALJ to decide the issue of notice.

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[2] Form K-WC E-1, Application for Hearing filed August 7, 2008.

[3] *Bauer v. Moran Manor*, No. 1,041,383, 2010 WL 1918579 (Kan. WCAB Apr. 30, 2010).

[4] *Id.*

On September 27, 2010, the ALJ entered an Order finding that claimant did not give timely notice and denying claimant's request for preliminary benefits. Claimant has appealed the single issue of whether she gave respondent timely notice of her accident or accidents.

Claimant's Application for Hearing claims she suffered a series of accidents from her first day worked, August 16, 2007, through her last day worked, September 26, 2007. In her deposition taken November 24, 2008, claimant testified that she had an accident while working at respondent. When asked by respondent's attorney about her accident, she stated: "My knee would just begin throbbing."[5] She testified that she complained about the throbbing to Jennifer Fox, respondent's nursing home administrator. Claimant stated that she asked Ms. Fox to stop scheduling her to work three days in a row because of the pain. Claimant admitted she had not filled out any incident reports. At no time during her deposition did claimant state that she had suffered a single traumatic accident that caused her right knee pain.

At the preliminary hearing held December 23, 2009, claimant, when asked by her attorney to tell the court about her accident, stated that she was asked by an aide to help reposition a resident in a wheel chair and as she was performing that task, she felt something in her knee pop. She said she felt severe pain and started limping. She testified that she knew she had been injured. Claimant said that Ms. Fox was not at the facility at the time of the accident, but she reported the injury to Ms. Fox within a day or two.[6] Claimant continued to work and continued to complain to Ms. Fox that the job was making her knee condition worse. Claimant testified she made it clear to Ms. Fox that her injury was work related. On September 15, 2007, claimant wrote a letter to Ms. Fox, stating:

> I regret to inform you that I need to give a 2 weeks notice due to some personal health problems. When I took this job I really felt I could do it, but nursing homes has changed so much in the past 12 years that I feel I'm not doing you or the residents justice. I would really like for this to be a 2 week notice instead of the end of the schedule.[7]

Claimant's last day of work was September 26, 2007.

Ms. Fox testified that claimant did not tell her she had injured her knee in August 2007 while repositioning a resident. Had claimant reported a work-related injury, Ms. Fox would have asked her to fill out the employee's portion of the workers' compensation

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[5] Depo. of Linda Bauer, November 24, 2008, at 14.

[6] Claimant did not say what day the popping incident occurred, only that it was in August 2007.

[7] P.H. Trans. (Dec. 23, 2009), Resp. Ex. 3.

packet and would have contacted the corporate safety director, who handles all employee incidents. Respondent's attorney asked Ms. Fox if claimant at any time during her employment said that her work was making her knee worse than when she had started, and Ms. Fox answered: "I don't recall."[8] Ms. Fox said the first time she got actual notice that claimant was claiming an injury at work was when she received a certified letter from claimant's attorney sometime in July or August 2008.

Respondent argues that claimant has given inconsistent and unbelievable testimony in this case, citing as examples claimant's deposition testimony that her knee started throbbing at work beginning her first day versus her preliminary hearing testimony that she suffered a single traumatic accident while repositioning a resident; claimant's testimony that she resigned from her position at respondent because of her right knee injury versus her resignation letter setting out her reason for resigning as "personal health problems"; claimant's testimony that she thought Ms. Fox told her what to put in her termination letter versus her later testimony that she did not know if she had a face-to-face conversation with Ms. Fox about the resignation letter; and claimant's testimony that she had expected Ms. Fox to stop making her work three days in a row versus her payroll records, which indicate that only on one occasion did claimant work three days in a row.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that

[8] P.H. Trans. (Dec. 23, 2009) at 40.

> in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2009 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2009 Supp. 44-555c(k).

ANALYSIS

The ALJ determined "based on . . . claimant's resignation letter, that notice was not given."[11] Presumably what the ALJ meant was that notice was not timely given. The parties agreed that claimant gave written notice to respondent in July or August 2008 when Ms. Fox admittedly received the letter from claimant's attorney.

The first question to decide in determining the issue of notice is the accident date. Generally, an injured worker's date of accident is not an issue that the Board has jurisdiction to review on an appeal from a preliminary hearing order.[12] However, the Board will decide date of accident where it is necessary to do so in order to decide an issue which the Board does have jurisdiction to decide, such as whether notice was timely given by claimant to respondent.

Claimant testified to feeling a pop in her knee while positioning a patient in August 2007. However, she also testified to a gradual worsening from her daily work activities. K.S.A. 2009 Supp. 44-508(d) provides the following triggering events for determining the date of accident for an injury from a series of repetitive traumas.

1. The date the *authorized physician* takes the employee off work due to the work injury or restricts the employee from performing the work that caused the injury;

2. The date the employee gives the employer *written notice* of the injury;

3. The date the condition is diagnosed as being work related, *provided* that fact was communicated in writing to the employee;

4. And if none of the above apply, the date as indicated by the evidence but *in no event* the day of the regular hearing or the day before the regular hearing.

The first option set forth above does not apply as respondent did not appoint an authorized treating physician. However, the second benchmark does apply, as the record establishes that claimant's counsel provided respondent with written notice. The third option does not apply, as the record fails to establish that claimant was notified in writing that her repetitive trauma injury was work-related. Claimant's date of accident under K.S.A. 2009 Supp. 44-508(d) is deemed to be the day respondent received the letter from claimant's counsel. Claimant has established for preliminary hearing purposes that she provided respondent with timely notice of accident, as the date the written notice was received by respondent is, by operation of law, the date of accident. The Court of Appeals

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[11] ALJ Order (Sept. 27, 2010).

[12] K.S.A. 44-534a(a)(2).

has held that the date of accident under K.S.A. 2009 Supp. 44-508(d) can even be after the last day a claimant actually performed work for the respondent.[13] Therefore, notice was timely under K.S.A. 44-520.

CONCLUSION

Claimant gave respondent timely notice of her work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated September 27, 2010, is reversed and remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of December, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Blake Hudson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[13] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 1048, 207 P.3d 275 (2009), *rev. granted* May 18, 2010.